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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 741.

KLAXON COMPANY,

Petitioner,

—against—

STENTOR ELECTRIC MANUFACTURING COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

JOHN THOMAS SMITH,
Counsel for Petitioner,
1775 Broadway,
New York, N. Y.

KEVIN MCINERNEY,
Of Counsel.

THE COURT PRESS, N. Y. C.

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BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court is reported at 30 Fed. Supp. 425 (Appellant's Appendix 45-67).

The opinion of the Circuit Court of Appeals is reported at 115 F. (2d) 268.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on October 24, 1940.

Petitioner duly filed a petition for rehearing which was denied November 15, 1940.

The petition for certiorari was filed February 3, 1941, and was granted, as to the first question presented, March 3, 1941.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether a provision of the New York Civil Practice Act regarding moratory interest is applicable to an action in the Federal District Court for Delaware.

Statutes Involved.

The pertinent statutes are set forth in the Appendix, *infra*, page 23.

Statement.

On June 1, 1929, plaintiff, Stentor Electric Manufacturing Company, Inc., a New York corporation which was voluntarily dissolved on or about May 16, 1919, instituted an action in the United States District Court for the District of Delaware against Klaxon Company, a Delaware corporation with offices at Newark, New Jersey. Damages were claimed for breach of covenant by Klaxon to use its best efforts to further the manufacture and sale of certain patented devices covered by an agreement dated May 20, 1918 and executed in the State of New York (Apt. Appx. 15-22). The jury on July 18, 1939, returned a verdict in Stentor's favor for $100,000, and judgment was entered thereon July 20, 1939 (Apt. Appx. 2). Six days thereafter, viz., on July 26, 1939, plaintiff moved to correct the judgment by adding interest at the rate of 6% from June 1, 1929, the date of institution of suit (Apt. Appx. 44).

This was the first time that the question of interest was raised. The contract contained no provision for interest

and no request for an instruction to the jury regarding interest had been made at the trial. The District Court charged the jury on the subject of damages as follows:

> "If you find from the evidence and under the principles of law given to you by the court that the defendant broke its contract, your verdict should be for the plaintiff in such amount as will compensate it for the damages flowing from such breach" (Apt. Appx. 267).

No issue as to the place of performance of defendant's covenant had been considered by counsel, court, or jury. Inasmuch as the verdict was for only a fraction of the *ad damnum* ($1,000,000) it was impossible to determine whether or not the jury included interest in the verdict as rendered.

The stated basis for the motion for interest was Section 480 of the New York Civil Practice Act, which provides:

> "Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a,* final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered

* Relating to actions on policies of life insurance. The provision is set out in the Appendix, *infra*, page 23.

upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

The District Court on December 14, 1939, granted the motion, adding $60,821.92 to the judgment as originally entered (Apt. Appx. 68). The Circuit Court of Appeals, while conceding the difficulty of the interest question, concluded that Section 480 of the New York Civil Practice Act governed because (1) the matter of recovery of interest and the rate thereof was a matter of substance; (2) therefore it was governed by the law of the place of performance of the contract; and (3) New York was the place of performance.

Specification of Error to Be Urged.

The Circuit Court of Appeals erred in sustaining the District Judge's addition of interest to the verdict.

Summary of Argument.

The award of interest in this case rests upon a determination that the procedure prescribed by Section 480 of the New York Civil Practice Act governing the allowance of interest in New York Courts is a matter of substantive law binding on Federal Courts outside the State of New York.

The determination of the Circuit Court that Section 480 is substantive is in the teeth of a decision of this Court holding the identical statute to be procedural and not substantive (Point I).

The weight of federal authority is against the Circuit Court's position that interest is a substantive matter governed by the *lex loci* (Point II).

If this Court holds interest to be a matter of substantive law, inconvenience and delay in the trial of cases involving conflict of laws will result; controlling considerations of convenience and flexibility in judicial administration require that interest be classified as procedural (Point III).

The decision of the Circuit Court should therefore be reversed.

Argument.

POINT I.

Section 480 of the New York Civil Practice Act relates to procedure and remedy rather than to substantive right.

(a)

In *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, this Court, by Chief Justice Hughes, said with reference to Section 480 of the New York Civil Practice Act:

> "The statute in question concerns the *remedy* and does not disturb the obligations of the contract. * * * The ascertainment of that loss, *and of what would constitute full compensation*, was a matter of *procedure* within the range of due process in the enforcement of the contract. 'To enact laws providing *remedies* for a violation of contracts' and 'to alter or enlarge those *remedies* from time to time' was within the competency of the legislature."[1]

The action was for breach of a contract entered into in 1923 for the sale of red slate granules to be delivered in agreed quantities in that year and in the three years

[1] All italics in this brief are counsel's unless otherwise indicated.

following. Section 480 was enacted in 1927 and by its terms was made applicable to actions then pending or thereafter brought.[2] The trial in 1930 resulted in a verdict for the plaintiff, with interest added pursuant to the statute. The defendant challenged the inclusion of interest upon the ground that Section 480 in its retroactive application constituted an impairment of a contractual obligation in violation of Article I, Section 10, and of the due process clause of the 14th Amendment of the Federal Constitution. This Court, affirming the decision of the New York Court of Appeals, sustained the constitutionality of the Act.

As the above quoted portion of the opinion shows, the decision was based squarely on the ground that Section 480 related to matters of procedure and remedy and not to substantive rights. Yet the Circuit Court below held that the *Funkhouser* case did not help it to decide whether Section 480 of the New York Civil Practice Act was substantive or procedural!

Granting that the precise question presented by this case was not before this Court in the *Funkhouser* case, nevertheless both decisions depended on the determination whether the statute in question was substantive or procedural. The Court below lightly dismissed the considered pronouncement of this Court that Section 480, N. Y. C. P. A., is procedural.

To justify the departure the Court below cited no controlling authority but relied only on the remote analogy

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[2] That is, the second sentence of Section 480. The first sentence, which antedated 1927, was not in question in the *Funkhouser* case and is not in question in the case at bar.

The Section no longer expressly provides that retroactive effect shall be given to it, nor does it now except from its operation contracts to marry, as did the 1927 enactment; otherwise Section 480 remains the same as in 1927. The abolition of the right of action for breach of the contract to marry explains the deletion in 1939 of the reference to contracts to marry.

that interest "seems as substantial an item as, for example, loss of time in a personal injury action."[3]

In the courts below respondent sought to limit the scope of the *Funkhouser* decision by a peculiar interpretation of the opinion of the New York Court of Appeals in the case, 261 N. Y. 140. Respondent laid great stress on Chief Judge Pound's statement that Section 480, N. Y. C. P. A., "prevents an escape through procedural difficulties from the real obligation to make full compensation for breach of contract." This excerpt from Chief Judge Pound's opinion is perhaps somewhat misleading when wrenched from its context. The "procedural difficulties" adverted to consisted solely of the fact that prior to the enactment of Section 480 interest was denied in cases like the present one because, as the New York Court said in the same paragraph: "The rule of law was that if the defendant could not determine on any fixed day what was due, *no interest could be recoverable* because defendant knew not what, if anything, he should pay". As the Court of Appeals said in the preceding sentence: "The amendment to Section 480 of the Civil Practice Act changes a rule of the common law * * *". In other words, the New York Court of Appeals recognized that the effect of Section 480 was to make interest recoverable in cases where, by reason of the unliquidated character of the damages, it had theretofore not been recoverable; and it was in full contemplation of this effect of the statute that the New York Court of Appeals held Section 480 "reme-

[3] The Circuit Court thus translated "substantive" into "substantial". The same translation was condemned in *Sibbach* v. *Wilson & Co.*, 61 S. Ct. 422, as establishing a criterion that invites "endless litigation and confusion worse confounded". *Cf.* Dobie, The Conflict of State and Federal Judicial Power, page 3 (Published Lecture before Association of the Bar of the City of New York, February 26, 1941).

dial". 261 N. Y. 140, 145. There is no warrant for the respondent's suggestion in the courts below that Section 480 merely prevented the loss through technicalities of an originally enforceable claim for interest.

The obvious and correct construction of this Court's decision in the *Funkhouser* case was recently set forth as follows by the Ninth Circuit Court of Appeals in *Standard Oil Co.* v. *United States*, 107 F. (2d) 402, 418:

> "In *Funkhouser* v. *Preston Co.*, 290 U. S. 163, 54 S. Ct. 134, 78 L. Ed. 243, it was held that a New York statute allowing the recovery of interest in actions for breach of contract concerns the remedy, and that the mere fact that the legislation is retroactive does not bring it into conflict with the guaranties of the Constitution."

This Court denied certiorari in 309 U. S. 673.

This Court's decision in the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, and the adoption of the Federal Rules of Civil Procedure, make it of paramount importance that the distinction between substantive law and procedure be made clear and kept clear. The decision of the Circuit Court below that a particular statute which this Court has held to be procedural is nevertheless substantive for conflict of laws purposes cannot fail to produce confusion in the minds of the bar and the lower federal courts. Such refinements should not be created except under the strongest compulsion of sound policy. As set forth in Point III below, that compulsion is rather in the direction of classifying Section 480 as procedural.

(b)

The codification of which Section 480 N. Y. C. P. A. is a part is prefaced:

> "This act shall be known as the civil practice act, and, except as otherwise expressly provided, shall apply to *the civil practice in all the courts of record of the state.*" (N. Y. C. P. A., Sec. 1.)

This language shows that the New York Legislature regarded Section 480 as a regulation of its own adjective law and not as a grant of substantive right entitled to enforcement in foreign jurisdictions. As the New York Supreme Court held in *Matter of 1610 Avenue P, Inc.*, 168 N. Y. Misc. 918, construing Section 1 N. Y. C. P. A., *supra*:

> "It seems evident that the provisions of the Civil Practice Act were intended to apply solely to actions brought in the State Court, * * *"

A parallel situation was presented in *Fidelity-Phenix Fire Ins. Co.* v. *Cortez Cigar Co.*, 92 F. (2d) 882 (C. C. A. 5), cert. den. 303 U. S. 636. The action was in a Federal District Court in Georgia on a policy of insurance written in Florida and covering Florida property. A Florida statute provided that "in any of the courts of this State" a reasonable attorney's fee for the plaintiff should be included in any judgment for the plaintiff in an action on a policy of insurance. The District Court, awarding damages to the plaintiff, included an attorney's fee pursuant to the Florida statute. The Circuit Court of Appeals struck out the allowance of the attorney's fee, holding:

> "The Florida statute (Compiled General Laws, Sec. 6220) about attorney's fees requires that when a judgment is rendered for the plaintiff in any suit upon a

policy of insurance 'in any of the courts of this State', a reasonable attorney's fee for the plaintiff shall be included in the judgment. This statute is plainly a procedural one limited to the courts of Florida. It will of course be applied by Federal courts in Florida, but it has no force outside of Florida in either State or Federal courts. The statute adds no incident to Florida insurance contracts. It applies to suits in Florida courts on insurance contracts made anywhere. Its policy is to discourage the contesting of policies in Florida courts, and to reimburse plaintiffs reasonably their outlays for attorney's fees when suing in Florida courts. The right to this reimbursement is not inherent in the contract, but is an incident of a Florida suit on an insurance contract made anywhere. The federal cases cited above do not touch the enforcement of this statute outside of Florida, but they all relate to the enforcement of such statutes within the State that made them. *The very language of the Florida statute confines it to Florida and litigation in Florida*" (p. 885).

See also *Kline Bros.* v. *Royal Insurance Co.*, 192 Fed. 378 (C. C. S. D. N. Y.), rev'd on other grounds in 198 Fed. 468, where the court, per L. Hand, *J.*, on similar facts held:

> "The plaintiff claims an attorney's fee under the Florida statute, but this is too clearly matter of procedure to require discussion. It is controlled by the *lex fori*."

POINT II.

By the preponderance of authority the matter of interest is deemed procedural and governed by the *lex fori*.

The decision of the Circuit Court below was arrived at on the ground that "the matter of recovery of interest and the rate thereof is a matter of substance" and governed by the law of the place of performance. (115 F. (2d) 268, 276.)

It is submitted that this statement is not supported by the authorities.[4]

(a)

This Court has recently referred to interest as falling in the category of "remedial details" and as being only "an incident to the main remedy." *Board of County Commissioners* v. *United States*, 308 U. S. 343, 349, 350. The action, it is true, was between governmental entities rather than private litigants. But the pronouncements of the opinion as to the nature of interest are nevertheless pertinent. At page 352 it was held:

> "* * * The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. (Citing cases.)"

[4] There appears to be no Delaware decision as to whether interest is substantive or procedural. It is doubtful whether such a decision would be of binding force on a Federal Court sitting in Delaware. Cf. *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202; E. E. Cheatham, Sources of Rules for Conflict of Laws (1941), 89 U. of Pa. L. R. 430, 446-7; Note (1939), 52 Harv. L. R. 1002.

(b)

Standard Oil Company v. *United States*, 107 F. (2d) 402 (C. C. A. 9), *supra*, page 8, was an action brought in 1937 by the United States in a Federal District Court in California to quiet title to lands in California which Congress had granted to the State, reserving those lands known to be mineral as of the approval of the official survey. The United States also sought damages from the transferees of the land for the net revenues derived by the transferees from conversion of gas and oil, with interest from the time of conversion.

The extraction of gas and oil began in 1918 and ended in 1932. Section 3336, California Civil Code, which was in effect during this period, prescribed, as the measure of recovery in conversion cases, "the value of the property at the time of the conversion, with the interest from that time." In July, 1935, about 18 months before suit was commenced, the State law as to recovery for conversion of gas and oil was changed by the enactment of Section 349¾, California Code of Civil Procedure. This section was expressly retroactive. It provided that the recovery should be limited to the value of the oil or gas at the time of the extraction, "without interest".

The Government contended that the State law in force prior to the 1935 amendment was controlling and that the later statute could not, consistently with the due process clause of the 14th Amendment, be applied to deprive the United States of interest. The District Court entered a decree quieting title in the United States and awarding damages to the United States for the conversion of the gas and oil but denied interest as prayed from the date of the conversion. Both parties appealed. The United States attacked that part of the decree hold-

ing that the United States was not entitled to interest on the net value of the extracted minerals from the time of their conversion. The Government's position was stated as follows by the Circuit Court:

> "It is contended that the damages provision of the statute, applied retrospectively, impairs a vested right to recover interest. The local rule of damages for conversion appears originally to have been stated in *Douglass* v. *Kraft*, 9 Cal. 562, in terms substantially identical with Sec. 3336 of the Civil Code as later enacted in 1872. *Cox* v. *McLaughlin*, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164. In that same year a previous statute, passed in 1850, which adopted the common law of England as the rule of decision in the courts of that state, was codified in Sec. 4468 of the Political Code. The claim here is that, under the common law as announced in California, the right to recover interest in cases of trover and trespass *de bonis asportatis* was a substantive right, and that this vested right, as later embodied in Sec. 3336 of the Civil Code, could not be taken away by retroactive legislation. With respect to Sec. 3336, it is argued that the statute, as interpreted by the courts, announces a fixed rule of law allowing interest as a matter of right."

The Circuit Court rejected this view and affirmed the denial of interest, holding that the California statutes affected only the remedy. The decision follows the doctrine of the *Funkhouser* case, *supra*, and applies it to the converse situation; the Ninth Circuit's decision that a statutory amendment denying interest where it was previously recoverable affects only the remedy and not substantive right is the counterpart of this Court's decision in the *Funkhouser* case that a statute enlarging the recoverability of interest is only procedural.

(c)

Goddard v. *Foster*, 17 Wall. 123, was an action by an agent against his principal for compensation due under an agreement in writing. The action was brought in the Circuit Court for the District of New York. The agreement consisted of letters exchanged between the plaintiff in South America and the defendant, a resident of Massachusetts. The trial court charged the jury that the plaintiff was entitled to interest at the New York rate. A verdict was returned for the plaintiff. Affirming the judgment below, this Court held (p. 143):

> "Beyond all question the plaintiff was entitled to interest from the commencement of the suit, and it is not perceived that there is any error in the rule prescribed as to the rate, *as it is the rule of the lex fori*, especially as no rate is fixed in the contract and no place designated for its performance."

Mather v. *Stokely*, 218 Fed. 764 (C. C. A. 1), was an action instituted in a Federal District Court in Massachusetts on covenants in a warranty deed of lands in Florida. The question arose whether interest from the date payment was made for the deed should run at the Florida rate or at the Massachusetts rate. The trial court charged the jury to add interest to its verdict at the Florida rate. Reversing the judgment below, the Circuit Court of Appeals held:

> "According to the rules of law in the federal courts, the rate of interest under these circumstances is fixed by the law of the forum, which is, in this case, only 6 per cent. per annum. *Goddard* v. *Foster*, 17 Wall. 123, 143, 21 L. Ed. 589. The plaintiff, now the defendant in error, relies on several decisions of the Supreme Court which she cites to us. While these decisions recognize special circumstances, for ex-

ample, cases of obligations which stipulate for a special rate of interest, and cases of coupons which are expressly made payable at a specific place, yet, as a whole, they recognize the rule here stated."

George M. Jones Co. v. *Canadian Nat. Ry. Co.*, 14 F. (2d) 852 (E. D. Mich.), was an action for breach of a sales contract. It was apparently conceded by both parties that the interest should be computed according to the law of Ohio, where the contract "was made, and where it was agreed to be and was performed". The court, however, applying the rule of the *lex fori*, held (p. 856):

"It will be noted that the contract does not mention nor provide for any interest; and the case therefore is not one for the application of the rule that, when a contract provides for the payment of interest, the rate of such interest is to be computed according to the law of the state where such contract was to be performed. Here the right to interest is not contractual, but remedial, and is awarded, not as a part of the debt recovered, but as damages additional to such debt. *Herman H. Hettler Lumber Co.* v. *Olds* (C. C. A. 6), 242 Fed. 456, 155 C. C. A. 232; *New York Trust Co.* v. *Detroit, Toledo & Ironton R. Co.* (C. C. A. 6), 251 Fed. 514, 163 C. C. A. 508."

The prevailing rule is well stated in *Mitchell* v. *Reolds Farms Co.*, 256 N. W. 445 (Mich.), at page 449:

"Where interest is allowed, not under contract but by way of damages, the rate must be according to the *lex fori*. *Goddard* v. *Foster*, 17 Wall. 123, 21 L. Ed. 589. Where 'the only claim for interest is because of the delay for payment after the principal is due, it is now generally agreed that the interest is to be computed according to the law of the place where the judgment is recovered and not according to that of the place where the contract was made.' Story, Conflict of Laws (7th Ed.), par. 296a."

Montgomery, Federal Jurisdiction and Procedure (3rd Ed.), Section 517, concludes:

> "Where interest is awarded, not as a part of the debt recovered, but as damages, additional to the debt, it is settled that the rate of interest is to be determined with reference to the law of the state in which the district is located."

See also *Butte, A. & P. Ry. Co.* v. *United States*, 61 F. (2d) 587 (C. C. A. 9), to the effect that the *Mather* and *George M. Jones* cases represent the weight of federal authority.

In *Massachusetts Benefit Ass'n* v. *Miles*, 137 U. S. 689, the right to recover interest was held to be governed by the *lex fori*. The action was in a Federal Court in Pennsylvania upon a contract of life insurance. It does not appear where the contract was made. A Pennsylvania statute allowed interest from the date of verdict to the date of judgment. Approving the application of this statute by the trial court, this Court held, at page 691:

> "The courts of the State *and the Federal Courts sitting within the State* should be in harmony upon this point."

The fact that the *Massachusetts Benefit* case has to do with interest from the date of verdict, whereas the case at bar involves interest from the date of writ is plainly immaterial. Both are variants of interest *ex mora*.[5]

[5] The power of the Federal Courts must be identical with respect to both. If the allowance of one is a substantive matter, so must the allowance of the other be a substantive matter. It is significant that a single section of the New York Civil Practice Act provides for interest prior to verdict and interest from verdict to judgment, viz., Section 480.

POINT III.

Inconvenience and delay in the trial of cases involving conflict of laws will result from a determination that interest is substantive; controlling considerations of convenience and flexibility in judicial administration require that interest be classified as procedural.

Referring to the problem of distinguishing substance from procedure in the light of recent changes in the Federal law, Judge Charles E. Clark of the Second Circuit Court of Appeals has said:

> "The problem, then, is not one of discovering the location of a pre-existing 'line', but of deciding where on sound principles of policy a line shall be drawn. And this involves the delicate task of balancing interests, which is the way problems of federal and state adjustment have been met from the beginning and which is the essence of the judicial process." (Clark, Procedural Aspects of the New State Independence (1940), 8 Geo. Wash. L. Rev. 1230, 1234.)

Again, in an article entitled "The Tompkins Case and the Federal Rules" (1941), 24 J. Am. Jurid. Soc. 158, at page 160, Judge Clark said:

> "As in all matters of federal and state adjustment, no easy and mechanical rule of thumb is possible; but in final analysis there must be a weighing of the diverse policies and an adjustment of them in the light of the best judicial craftsmanship available for the task. As a corollary, there should not be acceptance of the idea that a mere particle of substance outweighs all elements of procedure, no matter how weighty, and that once such a particle is discovered, the matter is settled against federal uniformity. That obviously proves too much, for it would mean that in

practically no detail could the federal courts regulate their own manner and method of adjudication."

Applying the suggested criterion of "sound principles of policy", it is pertinent to explore the practical consequences of the Circuit Court's decision that interest is a matter of substantive law and therefore to be governed by the *lex loci*.

(a)

In every such case in the Federal District Court on a cause of action arising elsewhere than at the forum the court must determine the *lex loci* as a step preliminary to the award or denial of interest as well as the rate thereof and the period covered thereby. This must be done even though the *locus* of the cause of action may be unimportant for any other purpose in the case.

The conclusion of law as to the controlling *locus* must be based on proof of facts frequently difficult to ascertain, *e. g.*, in a contract action, the intention of the parties as to where performance of the obligation involved should take place.[6]

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[6] It would be intolerable to have the *lex loci* determined as it was in the case at bar. Here the place of performance was not considered an issue in the case until after the verdict was rendered. The District Court considered that interest was governed by the *lex loci contractus*. It remained for the Circuit Court to find that the law of the place of performance controlled the question. Under these circumstances naturally no evidence was offered by petitioner to show that New York was not the intended place of performance. The conclusion of the courts below that New York was the place of performance of petitioner's obligation to use its best efforts to exploit the patents rests on no factual support other than collateral evidence offered on other issues.

Had the trial taken place in a New York Court it may be presumed that the question of interest would have been covered by a charge, an exception to which would have preserved the right of an aggrieved party. This merely emphasizes the difficulty of transplanting unfamiliar legal procedures, which accounted for the long delay in the adoption of the Federal Rules of Civil Procedure.

It then remains to ascertain the law of the *locus* with respect to interest. The *locus* will often be a distant state. Its statute books may be unavailable at the forum especially if, as here, the relevant provision is found in a Code of Procedure.[7] Or there may be no statutory provision whatever, in which event the Court must examine the state decisions including those of the inferior courts if the matter has not been settled by the State Supreme Court. (See *West* v. *American Tel. & Tel. Co.*, 61 S. Ct. 336.)

Delay will be the concomitant of the research and inquiry thus necessitated. Moreover, as the law of interest in many states is obscure and confused, frequent appeals with respect to the denial or award of interest pursuant to state law must be expected.

The above mentioned consequences will flow directly from this Court's affirmance of the Circuit Court's decision. For if interest is substantive and governed by the *lex loci*, the District Court must, *as a matter of con-*

[7] The case may raise questions to which the statute and decisions construing the statute furnish no answer.

Thus in the instant case, there was testimony as to damages accruing in 1930 and 1931 (Apt. Appx. 107). The District Court nevertheless allowed interest from the commencement of the suit, June 1, 1929 (Apt. Appx. 69). If the jury in calculating $100,000 damages computed any part thereof as having been suffered in 1930 and 1931, as permitted by the above-mentioned testimony, it necessarily follows that the Courts below allowed interest to be recovered from a date prior to such damages.

There is nothing in Section 480 N. Y. C. P. A. or the New York decisions to support this allowance. The District Judge based his action on a palpable misapprehension of several New York cases. The Circuit Court acknowledged that no New York authority was cited on the point, but supported the award of interest by devising an hypothesis as to the periods of the accruals of the damages awarded by the verdict. In effect, the Circuit Court "made" some New York law to supply a gap left by the statute and decisions. Quaere: whether the Circuit Court was on solid constitutional ground.

stitutional right, give its rigid adherence to that law. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

The Circuit Court's classification of interest, if allowed to stand, will bear out the prediction of Judge Clark as to the effect of expanding the content of "substance" at the expense of "procedure":

> "If in fact we are bound by matters of constitutional right on these problems, I fear we shall just about be compelled to give up hopes of achieving any degree of procedural efficiency."[8] (Charles E. Clark, 8 Geo. Wash. L. Rev. 1230, 1242.)

(b)

A collateral effect of a determination that interest is "substantive" is to cast doubt upon the validity of certain of the Federal Rules of Civil Procedure. Several of these Rules bear a far more vital relation to the outcome of the ordinary case than does the matter of granting or denying interest. Cf. Rules 8(c), 15(c), 23(b), 35, 43(a). The leading draftsman of the Rules has himself conceded:

> "I venture the suggestion that more than half the rules can be questioned if some of the views already in print as to the wide content of 'substance' are sound." (Charles E. Clark, The *Tompkins* case and the Federal Rules, 24 J. Am. Jurid. Soc. 158, 161.)

If interest is substantive, what is the status of costs, an item closely akin to interest and often allowed or

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[8] The large amount of the interest item in this case may seem to justify the judicial time and effort expended. But it is common knowledge that interest is usually but a small fraction of the recovery. The practical operation, in future cases, of the rule laid down by the Circuit Court should be considered against the typical background rather than the exceptional.

denied, as the case may be, along with interest? Rule 54(d) purports to regulate the allowance of costs.

(c)

What, on the other hand, are the practical consequences if this Court, reversing the decision below, classifies interest as procedural?

In the first place, there need be no question of substituting blind obedience to the law of the forum in place of blind obedience to the *lex loci* (though on balance the former would surely be the more convenient rule). This Court, disposing of some doubts that had arisen, has held that the Conformity Act is repealed. *Sibbach* v. *Wilson & Co.*, 61 S. Ct. 422; *cf.* Moore and Friedman, Federal Practice, p. 36.

Accordingly an independent Federal rule regarding the allowance of interest may be promulgated either by Congress, or by this Court, or by the "Committee on Local District Court Rules", which has been appointed by the Judicial Conference.

Pending the adoption of such a rule or as an alternative thereto, the District Courts are guided by the principles as to the allowance of interest which the Federal courts themselves have formulated, those applicable to this case being set forth at pages 7-10 of the petition for certiorari herein. See *Jones* v. *Foster*, 70 F. (2d) 200 (C. C. A. 4); *Companhia de Navegacao Lloyd Brasileiro* v. *C. G. Blake Co.*, 34 F. (2d) 616 (C. C. A. 2).

CONCLUSION.

The decision of the court below is erroneous and should be reversed.

Respectfully submitted,

JOHN THOMAS SMITH,
Counsel for Petitioner,
1775 Broadway,
New York, N. Y.

KEVIN MCINERNEY,
Of Counsel.

New York, N. Y., April 7, 1941.

Appendix.

Section 1, New York Civil Practice Act:

"Short title and application. This act shall be known as the civil practice act, and, except as otherwise expressly provided, shall apply to the civil practice in all the courts of record of the state."

Section 480, New York Civil Practice Act:

"Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

Section 480-a, New York Civil Practice Act:

"Interest in actions upon policies of life insurance. In any action brought to recover upon a policy of insurance issued by any life insurance company doing business within the state, interest upon the sum recovered by the plaintiff, from the date of the receipt by the company of the completed proof of death of the insured, shall be included in the judgment entered upon the verdict, report or decision to the date thereof."